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ABSTRACT

Establishment of the new Law and Education Center (LEC) at the Education Commission of the States is announced in this document. It notes that the LEC offers preventive legal assistance to state educational programs and that it will focus on a limited number of specific legal issues. The central topic of this initial newsletter is competency testing in light of the Debra P. v. Turlington decision, which held that Florida's competency testing program did not give students timely notice of diploma requirements and also carried forward the effects of past discrimination. The authors review the judge's findings with regard to test bias, private school attendance, compensatory programs, potential injury to students, proof of discrimination, and plaintiffs' relief. They then briefly discuss the implications of the Debra P. case for school competency testing practices outside Florida. (RW)

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FOOTNOTES

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EA 013 638

1 A *new Law and Education Center* (LEC) was established at ECS in July 1979 with the help of a grant from the Spencer Foundation. LEC will assist states in understanding the legal and policy implications of various educational programs and practices, with particular attention to their effect on students. Based on the premise that "an ounce of prevention is worth a pound of cure," LEC will provide preventive legal assistance to states in specified subject areas in order (1) to promote more informed educational policy decisions and (2) to avoid or minimize litigation.

Given the small staff and the intent to do a few things well rather than many not so well, LEC will concentrate on a limited number of key subject areas. Therefore LEC will not attempt to provide general counsel to ECS or to states generally. In the first year LEC will focus on the legal issues involved in competency testing programs. For example, upon request by a state, the Center will review and comment on proposed legislation regarding competency testing. LEC will also enter into contracts with some states for more extensive legal assistance involving competency testing programs. LEC will expand into other specialty areas (for example, bilingual, handicapped, women's issues) in subsequent years if sufficient funding can be obtained.

Education Commission of the States

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To supplement legal research and assistance in the specialty areas, LEC will develop a capacity to collect and disseminate education law materials in areas of interest to the states. This Clearinghouse Project will focus on collection and dissemination of (1) summaries and copies of court decisions and federal laws, and (2) articles and other explanatory materials relating to these decisions and laws. An advisory explaining the use of this Clearinghouse will be issued in a later issue of *Footnotes* when the project is operational.

The Center will be directed by Merle McClung, who graduated from the Harvard Law School in 1972. Since then he has worked as a staff attorney at the Center for Law and Education in Cambridge, Massachusetts and also as a legal consultant to many state departments of education and other education agencies.

2 The first judicial decision dealing with the major legal questions that are raised by competency tests used as a prerequisite to a high school diploma was handed down by a federal district court in Florida on July 12. The court in *Debra P. v. Turlington*, No. 78-892 Civ.-T-H (M.D.Fla., decision 7/12/79), 48 *L.W.* 2058 (7/24/79), held that Florida's competency testing program did not give students timely notice of the new diploma requirement (see Footnote 4) and that the program carried forward the effects of past racial discrimination (see Footnote 3) in violation of the due process and equal protection clauses of the fourteenth amendment of the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974. In order to remedy the notice and discrimination problems, the court enjoined Florida from implementing the diploma requirement for four years (until the 1982-83 school year) (see Footnote 10).

The court held, however, that the test instrument (Footnote 5), the exclusion of private schools (Footnote 6), and the compensatory education program (Footnote 7) met constitutional standards. Therefore the court held that the test could be administered in the interim without the diploma requirement to assist in the identification and remediation of the test's skill objectives.

Other aspects of the *Debra P.* decision are discussed in Footnote 8 (Injury), Footnote 9 (Proof of Discrimination) and Footnote 11 (Appeal). Footnote 12 which outlines the implications of the decision for other states may be of special interest.

3 The court in *Debra P. v. Turlington* held that the Florida literacy examination (or "SSAT II") carried forward the effects of *past discrimination* against Florida's black students in violation of the equal protection clause of the fourteenth amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 20000d) and the Equal Educational Opportunities Act of 1974 (20 U.S.C. Sec. 1703) (Slip Opinion, p. 22). In reaching this conclusion, the court reviewed a number of Supreme Court decisions that invalidated facially neutral programs which perpetuate past racial discrimination, including *Gaston County v. United States*, 395 U.S. 285 (1965) where the Supreme Court held that a literacy test used to qualify voters in North Carolina was unconstitutional because "[i]mpartial administration of the literacy test today would serve only to perpetuate these inequities in a different form" (p. 17-18). The court took judicial notice of the *de jure* segregation of Florida schools in the period 1885-1967, the unequal education that black students received as a result of segregated schooling (p. 8), and found an intent to discriminate on the basis of race during the period 1967-71 before Florida public schools were desegregated. The court further noted that even after the schools were desegregated, "[t]he vestiges of the inferior elementary education [black plaintiffs] received still are present and affect their performance" (p. 12).

The defendants argued that the test, the diploma sanction and the compensatory program would remedy the effects of past discrimination through better educational opportunities, and thus met the educational justification standard set forth in *McNeal v. Tate*, 508 F.2d 1017 (5 Cir. 1975). They pointed to the improvement in the number of black students passing the test, whereas the plaintiffs emphasized the disproportionate number of blacks failing the test. The evidence showed that during the first administration of the test in October 1977, 77 percent of black students failed the mathematics section of the test compared to 24 percent of the white students; compared to the third and final administration of the test when approximately 20 percent of the black students who had taken the test three times had not passed compared to 1.9 percent of the twelfth grade white students (p. 12).

The court's response: "While the increased passing rate is impressive and Florida teachers and students are to be commended for their achievement, the court has serious reservations about attaching a constitutional imprimatur to a program which penalizes students who have been denied

equal educational opportunity" (p. 19). The court noted that "[t]he evidence and the ratios of passage of the SSAT II, both numerically and proportionately, indicate that race more than any other factor, including socio-economic status, is a predictor of success on the test;" that "peer status has not been attained;" and that "black school children, in the language of *McNeal* 'still wear the badge of their old deprivation-underachievement' " (p. 21).

> In the Court's opinion, punishing the victims of past discrimination for deficits created by an inferior educational environment neither constitutes a remedy nor creates better educational opportunities. When students regardless of race are permitted to commence and pursue their education in a unitary system without the taint of the dual school system, then a graduation requirement based on a neutral test will be permitted (p. 21).

Therefore the court enjoined the use of the Florida functional literacy examination for four years, as discussed below in Footnote 10.

4 Unlike the court's ruling on past discrimination which is limited to Florida's black students, the court's ruling of *inadequate notice* of the new testing program's diploma requirement applies to all Florida students regardless of color.

In concluding that the plaintiff students were not given sufficient notice of the new diploma requirement, the court noted that the state board of education approved the Minimum Student Performance Standards in April 1977 and the basic skill and functional literacy objectives were distributed to all Florida public schools in the summer of 1977 -- leaving only two months available for instruction in the application of basic skills before the first administration of the test and only 13 months of instructional time between December 1977 when the first test results were released and April 1979 when the third and last administration of the test were given (pp. 34-35). In contrast to this tight timetable, "the expert testimony upon which the court has relied indicates that *four to six years* should intervene between the announcement of the objectives and the implementation of the diploma sanction" (emphasis added) (p. 43).

The court quoted the conclusion of the Report of the Task Force on Educational Assessment Programs, appointed by the state board of education, which concluded that "the abrupt schedule" created most of the problems: "At the eleventh hour and with virtually no warning, these students were told that the requirements for graduation had been changed. They were suddenly required to pass a test constructed under the pressure of time and covering content that was presumed to be elementary but that their schools may or may not have taught them recently, well, or perhaps not at all" (p. 38). The court also raised some questions about the adequacy of the match between local classroom instruction and the statewide test objectives since each of the 67 county school boards were responsible for designing and implementing their own instructional programs and selecting their own textbooks, and no one text contained all the state's functional literacy objectives (pp. 35-36).

> Although there is evidence that certain skills were not taught in Florida public schools, let us assume *arguendo* that all the skills were taught. . . . The principal problem with the instant program is that the instruction in previous years took place in an atmosphere without the specific objectives now present and without the diploma sanction. . . . It is critical that at the time of instruction of a functional literacy skill, the student knows that the individual skill he is being taught must be learned prior to his graduation from a Florida public school (pp. 36-37).

The court proceeded to outline the legal basis for requiring adequate notice of the new diploma requirement by (1) citing the Fifth Circuit Court of Appeal's implicit recognition in *Mahavongsanan v. Hall*, 529 F.2d 448 (5 Cir. 1976) that termination for academic reasons created a due process right to timely notice; (2) distinguishing the practical evaluation problems and the lack of compulsory education involved in *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978); (3) citing *Goss v. Lopez*, 419 U.S. 565 (1975), in support of the conclusion that all the plaintiffs have "a property right in graduation from high school with a standard diploma if they have fulfilled the present requirements for graduation exclusive of the SSAT II requirement . . . "; and (4) citing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) in support of a conclusion that all plaintiffs have a liberty interest in being free of the adverse stigma associated with the certificate of completion" (pp. 39-41).

In response to defendants' argument that the momentum, interest, credibility and support of Florida public education now present would be undermined if the court found the test or the implementation schedule invalid, the court, citing

St. Ann v. Palisi, 495 F.2d 423 (5 Cir. 1974), stated that the Constitution stands between arbitrary government action and the innocent individual, and that Florida's implementation schedule was "fundamentally unfair" (pp. 43-44). Noting that due process is a flexible standard dependent upon the facts and circumstances of each individual case, the court found the facts in the instant case "compelling:"

> The plaintiffs, after spending 10 years in schools where their attendance was compelled, were informed of a requirement concerning skills which, if taught, should have been taught in grades they had long since completed. . . . The Court is of the opinion that the inadequacy of the notice provided prior to the invocation of the diploma sanction, the objectives, and the test is a violation of the due process clause (p. 42).

In reaching this conclusion the court also noted that "[d]efendants had other constitutionally acceptable alternatives such as phased introduction of the objectives in all grades without the diploma sanction and longer term remediation" (p. 43).

5 After reviewing the psychometric development of *the test* by the Educational Testing Service (ETS), the National Evaluation Systems (NES) and the Florida Department of Education, the *Debra P.* Court concluded that "the functional literacy test bears a rational relation to a valid state interest and thus is constitutional" (p. 30). The court dismissed most of the plaintiffs' challenges to the test instrument in the following footnote 23 to its opinion:

> 23. The Plaintiffs mounted a frontal assault upon a number of practices and procedures utilized by the DOE in the design and implementation of the test. Among the flaws asserted and considered were: the failure of DOE to solicit public input into the design of the test and its definition; the drafting of item specifications after the writing of items; the continual use by DOE of definitions of functional literacy extraneous and inconsistent with the official definition; the inadequacy of the research prior to the election of a cut-score; the questionable research methodology of the defendants' construct validity study; the failure to follow the APA standards for the design and implementation of tests which affect the lives of the takers in a significant fashion; the failure of DOE to adequately publicize what the test is and its inherent limitations; the inadequacy of the form notice sent to parents and students regarding the interpretations of scores on the test; the reliability of the test. *While some of the above mentioned flaws were indeed errors of considerable magnitude, they do not cross either individually or collectively the line between inadequacy and constitutional infirmity* (emphasis added).

The court discussed the concepts of content validity and construct validity in the main body of the opinion, and concluded that the test had both. The court's discussion of content validity is especially interesting because the concept was limited by the court to whether the test domain matched the definition of functional literacy set by the department and state board of education. The court held that the test met this definition, thus mooting plaintiffs' claim that the test domain did not match any defensible definition of functional literacy.

Also of interest is the court's definition of content validity which did not encompass the concepts of curricular and instructional validity, even though the court in other parts of its opinion expressed concern about a possible mismatch between what the test instrument measured and what had been taught in Florida classrooms. As noted in Footnote 4, the court put aside this concern because it found inadequate notice to be a more basic problem: "Although there is evidence that certain skills were not taught in Florida public schools, let us assume *arguendo* that all the skills were taught" (p. 36).

In a separate section, the court considered and rejected plaintiffs' claim of racially biased test items. The court noted that the test companies, and the department with the assistance of groups of teachers, reviewed the test items for possible racial or ethnic bias. The department also commissioned a scatter plot analysis of the test to determine possible item bias. "While some of the questions do seem to have factual settings unfamiliar to certain racial groups, the court is of the opinion that this distraction is minimal and unpervasive" (p. 30).

6 The *Debra P.* Court also rejected plaintiffs' claim that Florida's exclusion of *private schools* from the testing requirement violated the due process and equal protection clauses of the fourteenth amendment. The court noted that black students and their parents as a class are without substantial financial resources and thus less able than whites to attend private schools, as reflected in

the 95 percent white student composition of Florida's private schools, but held that the two categories of wealth and race "do not merge in this instance into one suspect classification" (p. 33). Since strict judicial scrutiny was not warranted, the court applied the more lenient "rational relation" standard, and found that the decision to apply the testing requirement "only to public schools over which the state already had significant curricular, instructional and financial control was both reasonable and constitutional" (p. 33). The court also noted that the claim raised a separate legal issue as to whether the state *could* require the testing program of its private schools and subsidize the cost.

7 Another claim rejected by the *Debra P.* Court was that the *compensatory education program*, established for students who failed the test, resegregated a disproportionate number of black students in violation of the fourteenth amendment. "The final question, one posed in *McNeal*, *supra* and *Gadsden County*, *supra*, is whether the testing program along with the compensatory education classes, although they cause resegregation of certain classrooms, will remedy the present effects of past discrimination, through better educational opportunities" (p. 45).

The court stated that the defendants must be "constantly wary" that the testing and compensatory education program "do not isolate or stigmatize any children for longer than is necessary to compensate for the identified deficits" (p. 45). But the court found that the compensatory program was limited to at most two classes or hours per day, the program was not static, and, although "serious questions of equating are still unresolved" (pp. 45-46), "the increase in the passage percentages evidence the efficacy of the program" (p. 45). Therefore "[t]he *McNeal* rationale for permitting the program to exist, regardless of its disproportionate racial composition has been satisfied as to the compensatory education facet, but not by the diploma sanction" (p. 46).

8 The *Debra P.* Court found that denial of a regular high school diploma caused three different kinds of *injury* to a student: (1) economic, (2) academic and (3) stigmatizing effects. As mentioned above in Footnote 3, the court held that the plaintiff students had a property right in graduation from high school with a standard diploma if they had fulfilled pre-existing requirements, and that they had a "liberty interest in being free of the adverse stigma associated with the certificate of completion" (p. 46).

In support of the finding of economic injury, the court cited the fact that the State of Florida Career Service Department employs only 10 percent of its labor force from those people who do not have high school diplomas, and these jobs were described as both "menial" and "dead end" positions (p. 7). The court also stated that a certificate of completion will not be considered a diploma for purposes of employment with the state of Florida.

Similarly, the court found that a certificate of completion will not be considered an adequate substitute for the kind of diploma that is a prerequisite to admission to the nine universities in Florida. Given the disproportionate failure rates set forth above in Footnote 3, the denial of a diploma thus has a disproportionate effect on the college attendance of black students (p. 7). In a footnote (6), the court cited a study that showed that the testing program would result in a 20 percent decline in black students' college attendance.

The stigmatizing effects of failing the test "is a very serious problem," the court found, since students "are often branded with the label 'functionally illiterate' " (p. 7). Later in the opinion, the court stated: "This stigma is very real and will affect the economic and psychological development of the individual" (p. 41).

9 The legal standard of *proof of racial discrimination* in competency testing programs has been subject to debate, and therefore the *Debra P.* Court's discussion of this standard merits consideration. Since the court found that the Florida testing program carried forward the effects of past discrimination, it did not need to find (and in fact did not find) present intent to discriminate in order to invalidate the program. "Although the proof of present intent to discriminate is insufficient, the Court is of the opinion that past purposeful discrimination affecting Plaintiffs in Classes B and C [black students] is perpetuated by the test and the diploma sanction regardless of its neutrality" (p. 17). See Footnote 3 above for discussion and citations regarding past intent.

The court began its discussion of the legal standard of present intent to discriminate by pointing to the Supreme Court's redefinition of the

standard in *Washington v. Davis*, 426 U.S. 229 (1977). The Supreme Court in *Davis* held that the disproportionate racial impact of a test could be evidence of, but was not sufficient to establish, a racially discriminatory purpose. The *Debra P.* Court also quoted from Justice Stevens' concurring opinion in *Davis* to the effect that the most probative evidence of intent is frequently objective evidence of what actually happened, and that a person is normally presumed to have intended the natural consequences of his or her deeds. The *Debra P.* court cited other relevant case law:

> In *United States v. Texas Educational Agency*, 564 F.2d 162 (1977) . . . Judge Wisdom addressed the standard of intent after *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis, supra.* Applying the "objective standard" found in *Monro v. Pape*, 365 U.S. 167, 187 (1961), Judge Wisdom held that "official decision makers would be held to have intended the reasonably foreseeable consequences of their decisions." *Texas Educational Agency, supra* at 167 (p. 15).

The *Debra P.* Court then discussed the Supreme Court's recent holding in *Personnel Administrator of Massachusetts v. Feeney*, 47 *U.S.L.W.* 4650 (June 5, 1979) that discriminatory purpose implies that the decision maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects on an identifiable group. The *Debra P.* Court noted a balancing test in the *Feeney* case:

> While forseeability was by no means dispositive or the touchstone, it was possible to draw inferences from the action where the adverse consequences were clear and obvious. Whether those inferences, if found, could be dispelled by other legitimate interests was critical to the Court's final determination (p. 16).

Applying this balancing test to the foreseeability of the disproportionate black failure rate and the legitimate interests in the test program, the *Debra P.* Court found:

> While the state Defendants have demonstrated a disregard of the reasons for the disproportionate black failure (i.e., the inferior education received during segregation and the dearth of interim remediation), the Court has not been presented with sufficient proof that the motivation for implementing the program was in *Feeney* terms "because of" the large black failure statistics" (p. 17).

10 In fashioning *relief* to the plaintiffs, the *Debra P.* Court limited injunctive relief to "only that time necessary to purge the taint of past segregation and inadequate notice" (p. 47). "In light of the evidence relating to the necessary period of time to orient the students and teachers to the new functional literacy objectives, to insure instruction in the objectives, and to eliminate the taint on educational development which accompanied segregation, the Court is of the opinion that the state should be enjoined from requiring passage of the SSAT II as a requirement for graduation for a period of four (4) years" (p. 47). The court in its final judgment made separate holdings on notice (due process) and discrimination (equal protection), but ordered a single remedy for both by enjoining the use of the test as a diploma requirement until the 1982-83 school year.

By limiting its relief to four years, the court did not follow through fully on the logic of either its due process or equal protection analysis. As mentioned above in Footnote 4, the court's due process rationale was based upon "an educational *atmosphere* directed by the existence of specific objectives and stimulated throughout the period of instruction by a diploma sanction" (emphasis added) (p. 42). Since the court recognized that these basic skills are usually and best taught in earlier years (p. 43), this rationale would logically require notice to students in the earlier grades.

Similarly, the court's equal protection rationale was based on the constitutional prohibition against programs that carry forward the effects of past discrimination. Although recognizing at one point that discrimination can continue with desegregated schooling (pp. 11-12), the court in effect equated discrimination with segregated schooling.

Four years is the time required in order to graduate named plaintiffs who received part of their education within a segregated school system. Four years is also consistent with the court's finding that "four to six years should intervene between the announcement of the objectives and the implementation of the diploma sanction" (p. 43). Although some will contend that the notice and discrimination rationales logically call for separate and longer injunctions, the court apparently concluded that as a practical matter four years would remedy both problems.

11 Florida defendants have filed a notice of *appeal* with the U.S. Fifth Circuit Court of Appeals, and the *Debra P.* plaintiffs have stated their intent to cross-appeal. Future issues of *Footnotes* will keep readers apprised of developments in this appeal, but the Fifth Circuit is backlogged with cases and it is possible that the four year injunction will have elapsed before a final decision is handed down, especially given the possibility of a subsequent appeal to the U.S. Supreme Court.

12 The *Debra P.* decision is binding only on the Florida defendants but, as the first major case discussing the legal parameters of competency testing, it is likely to have considerable influence on courts and competency testing programs in other jurisdictions. Although courts in other states where competency testing programs are litigated will base their decisions on the specific factual situations presented by those cases, the general factual situations in many other states are close enough to that in Florida to warrant careful consideration of the *Debra P.* holdings on inadequate notice and racial discrimination.

One serious misreading of the *Debra P.* decision by some states is that its legal rationale applies only to Southern states with a history of *de jure* segregation. This is a questionable interpretation for at least two reasons. First, the *Debra P.* Court's holding on notice is not based on a finding of racial discrimination, *de jure* or otherwise. As summarized above in Footnote 4, the notice holding is based on due process considerations that apply to all Florida students regardless of race and the presence or absence of racial discrimination. Second, as set forth above in Footnote 3, the discrimination holding was based on the constitutional prohibition against programs that carry forward the effects of prior discrimination. The fact of earlier court findings of *de jure* segregation in Florida schools made it logical for the *Debra P.* Court to cite this history as proof of prior discrimination, but the legal principle would also encompass other evidence or findings of prior racial discrimination.

At least 14 states have competency testing programs similar to Florida's program in that passing the test is or soon will be a prerequisite to a high school diploma. School districts in many other states have adopted similar competency testing programs through local option authority. Those states and school districts would be well-advised to review their competency testing program in light of the *Debra P.* decision. States and districts with earlier findings of racial and/or linguistic discrimination, either judicial or administrative findings, should review their programs with special care to make sure that their version of competency testing does not carry forward the effects of that past discrimination. They should also review their programs regarding adequate notice, taking note of the fact that the *Debra P.* Court measured notice from the date students were given notice of the performance objectives to which they would be held accountable rather than the date when the statute was enacted. This kind of review could lead to modifications in competency testing programs that make them fairer to students and less vulnerable to legal challenge and judicial modification.

13 This is the first issue of *Footnotes*, a newsletter to be published on an occasional basis by the Law and Education Center (LEC). The newsletter is intended as footnotes to the primary work of LEC. As such, *Footnotes* will not attempt to be a comprehensive survey of developments in education law but, like LEC itself, will focus on the specialty areas mentioned above in Footnote 1, and on new and developing areas of education law that are of special note given the preventive law purposes of LEC.

We anticipate publishing about four to six issues of *Footnotes* a year, but the exact number will depend on legal developments and other demands on LEC time. *Footnotes* will be disseminated free of charge to Commissioners and primary ECS constituents. Attorneys who work for ECS members can also receive *Footnotes* free of charge by sending a letter to LEC stating their professional affiliation with an ECS member. Other interested persons and organizations can subscribe to *Footnotes* by completing the following form.

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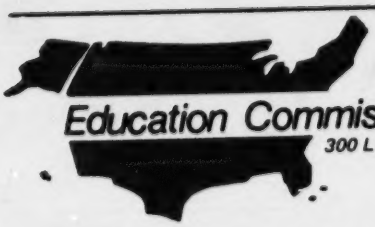

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